

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 6TH MARCH 2007 / 15TH PHALGUNA 1928

CRL.A.No. 573 of 2001()

CC.13/2000 of ENQUIRY COMMR. & SPL. JUDGE, THRISSUR
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APPELLANT:

KUNJI HASSAN,
FORMER VILLAGE ASSISTANT,
PALLOOR DESAMANGALAM GROUP VILLAGE,
THALAPPILLY TALUK

BY ADV. SRI.P.VIJAYA BHANU
SMT.P.MAYA

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, REPRESENTING DY.S.P., V.A.C.B.,
THRISSUR

BY PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 06/03/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J.M.JAMES, J.

Crl.A. No. 573 of 2001

Dated this the 6th day of March, 2007

J U D G M E N T

The accused in C.C.No.13/2000 on the file of the Enquiry Commissioner and Special Judge, Thrissur, was found guilty under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, in short 'the Act'. He was therefore, convicted and sentenced thereunder to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/- in default to undergo simple imprisonment for one year under Section 7 of the Act and, rigorous imprisonment for four years under Section 13(1)(d) of the Act. The sentences were directed to run concurrently. Hence, this appeal.

2. The brief facts of the case are that PW.9, Lakshmikutty, had agreed to sell her property to PW.2, Balan. At the instance of PW.9, PW.2 approached PW.6, the Special Village Officer of Pallur-Desamangalam Group Village at Thalappally Taluk. PW.6, being a sick person, entrusted the measurement of the property of PW.9 to the appellant, a Village Assistant of the same office. The appellant along with PW.7, the

Villageman, went to the property of PW.9 and measured the same. It was on 27/01/1999. During the measurement, it was found that the property was lying in two sub divisions of 7 and 8, within Survey No.258 of Pallur Village. While PW.2 along with PW.7 and the appellant were returning in an auto rickshaw, the appellant demanded a bribe of Rs.1,500/-. PW.2 had in his possession Rs.800/-. He gave the same to the appellant. It was about 12 noon on 27/01/1999. On 01/02/1999, the appellant reiterated his demand for the balance amount of Rs.700/-.

3. PW.2, therefore, reported the matter to PW.10, the Dy.S.P of Vigilance and Anti-corruption Bureau, Thrissur. Exhibit P2 F.I.Statement of PW.2 was recorded. A trap was arranged. MO.1 series notes, (seven notes of hundred rupees denomination), brought by PW.2 was chemically treated. PW.3, a Senior Inspector at the Legal Metrology Department, Thrissur, and another department employee were summoned to be the trap witnesses. MO.1 series notes were handed over to PW.2, with detailed instructions about the handing over of the same to the appellant, when the bribe would be demanded by him, Exhibit P4 being the entrustment mahazar. PW.2 and others

proceeded to the village office. The appellant was sitting on his seat. PW.5, the Villageman was also in the adjacent seat of the office.

4. PW.2 gave Exhibit P3 application, containing the request to issue a possession certificate in respect of the property of PW.9, measured by the appellant and an another. Along with the application, he kept MO.1 series notes. The appellant, according to PW.2, took the same, counted it and kept it in his pocket. After the receipt of MO.1 series notes as bribe, PW.2 came out of the village office and gave a pre-determined signal as instructed by PW.10. Immediately, PW.10, along with others, rushed to the office of the appellant and interrogated him. The appellant had stated that he had received the amount as given to him by PW.2 out of his own free will and there was no demand as such from the appellant. PW.3, on the instruction of PW.10, took out MO.1 series notes from the pocket of the appellant. On treatment, the right hand fingers of the appellant were found tainted and positive to the test. M.O.1 series notes were also treated and proved positive. The pocket portion of the shirt worn by the appellant where MO.1 series notes were kept,

was also treated and proved positive. The appellant was arrested after completing the formalities required. Exhibit P5 is the recovery mahazar. PW.4, the Assistant Engineer, was directed to prepare Exhibit P6 site plan and Exhibit P7 building plan of the place of occurrence. Exhibit P9 attendance register and Exhibit P10 movement register of the Village Office were also seized by PW.10, during the process of recovery of MO.1 series from the possession of the appellant. PW.6, the Village Officer, also came back to the Village office, as he was out of the office, at the time of the trap that was led by PW.10 and others.

5. The investigation was completed by PW.10. The final report was accordingly filed before the court below.

6. To prove the case against the appellant, the prosecution examined 10 witnesses and marked 11 documents. Seven material objects were also marked and identified. There was no defence evidence adduced, although the appellant gave a long statement during his questioning under Section 313 of the Code of Criminal Procedure. Exhibits D1 and D2, the contradictions in the statements recorded under Section 161 of

the Code of Criminal Procedure, in respect of PWs.2 and 3, were marked.

7. After whole appreciation of the evidence, the learned Special Judge found the accused guilty and, therefore, convicted and sentenced him, as stated above.

8. The learned counsel for the appellant had contended that as the defence case reveal, PW.2 was on enimical terms with the appellant, as he was the person who intercepted the lorries carrying illegal sand, mined from the adjacent river and also strictly proceeded against them, as per the law. There had been threat to the appellant. The illegal activities were going on, near to the house of PW.2. Threats were caused not only by others but by PW.2 also. The appellant did not demand any amount. MO.1 series notes were thrust into the pocket of the appellant, on 02/02/1999, at about 12.10 p.m., while the appellant was at his work in his office. Before he could react, PW.10 and others came and caught hold of him and made him an accused in the case. The counsel also argued that mere receipt of the amount from another will not be sufficient to hold the appellant-accused guilty, under the provisions of the Act, in the

absence of any evidence of demand and acceptance of an amount, as illegal gratification. The counsel relied on **T.Subramanian vs.State of Tamil Nadu** [2006 (1) SCC 405], to emphasise that point. The counsel also relied on **Subash Parbat Sonvane Vs.State of Gujarat** [AIR 2003 SC 2169] to interpret the meaning of the words 'accepts' or 'obtain', as contained in Section 13(1)(a)(b) and (d) of the Act and, further argued that before convicting an accused, the court has to arrive at a conclusion whether there was an acceptance of what was given as a bribe and also whether there was an effort on the part of the receiver to obtain the pecuniary advantage by way of acceptance of the bribe. The counsel further relied on **Smt.Meena Balwant Hemke vs.State of Maharashtra** [AIR 2000 SC 3377] and argued that as PW.3 had not seen the demand and acceptance of the bribe by the appellant, the presence and importance of PW.3, as a shadow witness, is not established by the prosecution. Therefore, the evidence of PW.3 cannot be accepted to convict the appellant.

9. The learned Public Prosecutor on the other hand submitted that if the appellant had reasonably believed that

PW.2 and others are on enimical terms with him, he ought to have resisted, when the amount was thrust into his pocket, or ought to have taken the help of others, particularly, PW.5, who was present and sitting in the adjacent seat. The evidence of PW.5 is against the defence version and, therefore, prayed that the evidence of PWs.2, 3, 5, 7 and 10 may be accepted, regarding the occurrence, together with that of PW.9, who gave Exhibit P3 application for issuance of the possession certificate.

10. There is no challenge or dispute with regard to the purchase of the property belonging to PW.9 by PW.2. The measurement of the property of PW.9 by PW.7 and the appellant had been also admitted. PW.2 deposed that it was while he was returning along with the appellant, PWs.7 and 8, that the bribe of Rs.1,500/- was demanded by the appellant. It is true that except the evidence of PW.2, regarding the payment of Rs.800/- to the appellant, while returning in the auto rickshaw, no one else speak about the same. PW.8 brother of PW.9 deposed that he had not heard the demand of Rs.1,500/- and also the giving of Rs.800/- by PW.2. However, he had deposed that PW.2 has told

him about the demand of Rs.1,500/- by the appellant as well as the payment of Rs.800/- by PW.2, to the appellant.

11. The main contention as discussed above is, whether there was any demand of bribe and acceptance of Rs.700/-, which had been recovered under Exhibit P5 recovery mahazar from the possession of the appellant by PW.10 and others. The fact of thrusting MO.1 series notes, into the pocket of the appellant by PW.2 had been emphasised repeatedly by the counsel for the appellant. He also relied on the right hand fingers alone turning positive and pink, during the test by PW.10, as an instance to contend that he took out MO.1 series notes, with his right hand, while it was attempted to be thrust into his pocket. The evidence available on record show that MO.1 series were taken out of the pocket of the appellant by PW.3, one of the shadow witnesses to the trap. He deposed that MO.1 series were in the pocket of the appellant. Therefore, the contention whether MO.1 series were thrust into the pocket of the appellant or the latter had received it, on demanding the same from PW.2 and he himself, kept it in his pocket, needs further detailed examination.

12. PW.7 is the Villageman who had gone along with the appellant for measuring the property of PW.9. They returned in the same auto rickshaw along with PWs.2 and 8. At the time of the trap and recovery of MO.1 series notes under Exhibit P5, PW.5, the Villageman was also present in the room adjacent to the seat of the accused-appellant. PW.5 did not say at all that PW.2 entered and thrust MO.1 series notes into the pocket of the appellant. Of course, he also did not see the appellant receiving MO.1 series. The version of PW.2 is that he gave MO.1 series along with the application. As rightly argued by the prosecution, the consistent case of the appellant, during the cross-examination of the prosecution witnesses as well as during examination under Section 313 Cr.P.C was that MO.1 series were thrust into the pocket of the appellant by PW.2. If that be so it cannot go unnoticed by PW.5. There is no evidence available or any stand taken, at any time, by the appellant that he had resisted such thrust. If PW.2 is one of the persons who were active in committing illegal sand mining, which was intercepted, prevented and action taken by the appellant, particularly, when threat even to the life of the appellant was

existing, it cannot be said that the appellant would coolly receive and be calm without any reaction, when a person like PW.2 came and thrust notes into the pocket of the appellant.

13. The counsel for the appellant had contended that there is no clear evidence for demand of the amount. I agree with the legal principle that mere receipt of Rs.700/- from PW.2 will not be a ground to hold the appellant guilty under Section 13(2) or Section 7 of the Act. There must be clear evidence for demand and acceptance of the same, as an illegal gratification. The consistent case of the prosecution is that Rs.800/- was paid at the first instance and Rs.700/- was the balance amount. Although, there is no clear evidence regarding the acceptance of Rs.800/-, when the contention of thrusting of the amount into the pocket of the appellant having not acceptable, the evidence of PW.2 is to be accepted that the amount of Rs.700/- was received by the appellant, as an illegal gratification, for the favour done to PW.9 in giving a possession certificate with corrected sub division numbers of the survey number of the property. The amount of Rs.700/- has been received by the appellant on his demand of the illegal

gratification from PW.2. I, therefore, reject the contention of the appellant that there was thrusting of MO.1 series notes into the pocket of the appellant.

14. In T.Subramanian's case, cited above, there were arrears due to the temple from the accused there in. The receipt of Rs.200/- had been explained satisfactorily by the accused towards the arrears due to the temple by way of lease amount. Therefore, the Apex Court accepted the explanation as probable and reasonable and had upheld the acquittal of the accused by the sessions court. Similarly, in **Punjabrao vs.State of Maharashtra** [2002(10) SCC 371], a patwari was collecting loan amounts due to the Government. The complainant was a debtor to the Government. The accused therein explained that the amount in question was received by the accused towards the loan. The court accepted such explanation and acquitted him. As rightly held by the Apex Court, in Subash's case, cited above, the receipt or acceptance of the bribe, or obtaining of a bribe for the pecuniary advantage, depends on the facts and circumstances of each case. Therefore, a particular situation in a case may not fit in to the facts of another case. The courts will

have to analyse, appreciate and differentiate, before arriving at a conclusion whether the illegal gratification was obtained otherwise than to meet the legal requirement. Except saying that MO.1 series notes were thrust into the pocket of the appellant, no other explanation is available from the appellant, as I have already rejected that contention. It is the burden of the appellant, to explain, or to prove, how MO.1 series notes came into the possession of the appellant.

15. In Subash's case, cited above, the Apex Court dealt with a fact in which the complainant was waiting at the police chowki. Accused asked the complainant the reason for his waiting. The complainant replied that he had brought one witness for examination by the police. After asking the complainant to come in the evening, the accused proceeded towards the toilet. At that time, the complainant followed him and gave something to the complainant, which the accused took out from his pocket and the accused in turn kept it in his pocket. The Apex Court held that it cannot be inferred that the accused had demanded any amount from the complainant or he had obtained the same from the complainant. The learned counsel

for the appellant relying on this fact situation, submitted that there being no evidence except that of PW.2, regarding the demand, the appellant may be also given the benefit of doubt. In the case at hand, the appellant had reported the matter to PW.10 and it was thereafter, they went to the accused, as discussed and explained above. If there was any hesitation for the appellant he had ample opportunity to resist the move of PW.2 in obtaining MO.1 series notes from PW.2. The evidence of PW.5 is one of the best available evidence, wherein, I can hold that the appellant had received the amount, as per his prior demand from PW.2 and, the amount was given to him by PW.2 through MO.1 series. Therefore, the facts of Subash's case is inapplicable with the facts of this case.

16. The right hand fingers of the appellant alone becoming pink during the test had been emphasised by the counsel to show that, as discussed above, he had not counted the notes. I have already rejected this contention. Therefore, no further explanation is required. Merely, because PW.2 had deposed that the appellant had counted MO.1 series notes and kept it in his pocket, in the absence of any defence evidence and

from the available circumstances, I hold that the appellant had received the amount and the said reception comes within the meaning of the word 'obtain' as contained in Section 13(1)(d) which is punishable under Section 13(2) of the Act.

17. Relying on Smt.Meena Balwant Hemke's case, cited above, the counsel submitted that PW.3 had not heard the appellant demanding the amount when PW.2 and PW.3 entered the Village Office. It is true that the presence of the trap witness will give a clear evidence regarding the conduct of the complainant, who had been instructed by the investigating officer, who lays the trap and also the conduct of the accused, who receives the bribe. In Smt.Meena Balwant Hemke's case the shadow witness, Victoria, was first to enter and hold the hands of the accused who was in possession of the bribe. But she had not been examined. The Apex Court, therefore, took exception to such step of the prosecution and gave the benefit of doubt to the accused. In this case, out of the two trap witnesses, PW.3 had been examined. It was he who took out MO.1 series notes from the pocket of the appellant. His hand was also tested and proved positive. Therefore, the non-examination of other

trap witness, unlike the facts of Smt.Meena Balwant Hemke's case, is not fatal to the prosecution case. The facts, thus, being different, the same principle cannot be applied in the case at hand.

18. The case, as put forward by the prosecution, has been appreciated as a whole. The evidence available on record clearly shows that the appellant had received MO.1 series notes by way of illegal gratification for doing favour of issuance of a possession certificate after correcting the sub division numbers in the survey, within which the property of PW.9 lies. An attempt had been made by the appellant that it was PW.6, the Village Officer, who should have issued the possession certificate. The evidence available, clearly show that PW.6 was suffering from heart ailments. Hence, he had deputed the appellant and PW.7 to measure the property. Therefore, it was at the recommendation of the appellant, the certificate would be issued. Merely because PW.8 had not fully supported the version of the prosecution and PW.7 became hostile to certain portion of the evidence, it will not affect the case of the prosecution as a whole. Therefore, I hold that the appellant

being a public servant had obtained an illegal gratification other than his legal remuneration as a motive for showing favour to the appellant as well as to PW.9, who, otherwise, have to go through the procedure of registering the documents for correcting the survey numbers under a registered document. Thus, the ingredients in Sections 7 and 13(1)(d) had been established by the prosecution which are punishable under Section 13(2) of the Act. Hence, I uphold the conviction of the appellant.

19. At this stage, the learned counsel for the appellant submitted that the sentence imposed by the court below is excessive and disproportionate to the act alleged and proved by the prosecution. Therefore, prayed that the sentence may be modified and reduced. Under Section 7, the punishment prescribed is imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine. Under Section 13(2), the punishment shall be imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine. No fine had been imposed under Section 13(2), which is an

irregularity. The appellate court being a court of facts can correct that irregularity, as it is a statutory requirement.

20. I have discussed in detail the conduct of the appellant as well as the circumstances under which the bribe was received by him. While questioning under Section 313 Cr.P.C., he had stated that he was sick due to urinary problems and had put in about 30 years of service.

21. During the hearing of this appeal, the learned counsel showed me the original medical documents, issued from the Moulana Heart Foundation, which reveals that he was suffering from heart ailments as on 16/03/2006. He had undergone Coronary Angiogram procedure. He was aged about 56 years at that time. The counsel also brought to my notice that he was suspended from the service, in the year 1999, and dismissed in the year 2001. Considering all the above facts as special circumstances, I am of the opinion that the sentence of rigorous imprisonment for three years under Section 7 of the Act and rigorous imprisonment for four years under Section 13(2) read with Section 13(1)(d) of the Act respectively be modified and reduced to rigorous imprisonment for six months under the

former count and rigorous imprisonment for one year in the latter count. The fine of Rs.25,000/-, imposed by the lower court, is sustained. However, the default sentence of simple imprisonment for one year is reduced to that of four months. Though, there was no fine imposed by the court below under Section 13(2) read with Section 13(1)(d) of the Act, and as the same being a statutory requirement, I impose a fine of Rs.20,000/-, in default of which to undergo simple imprisonment for three months.

The substantive sentences shall run concurrently.
The appeal is partly allowed as above.

(J.M.JAMES)
Judge

ms

J.M.JAMES, J.

Crl.A. No. 573 of 2001

J U D G M E N T

6th March, 2007